United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2107

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE RIOS, et al.,

Plaintiffs-Appellees,

-and-

JOHN GUNTHER, et al., etc.,

Applicants to Intervene-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS, etc., et al.,

Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff-Appellee,

-and-

JOHN GUNTHER, et al., etc.,

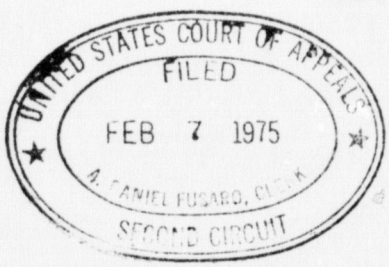
Applicants to Intervene-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS, etc., et al.,

Defendants-Appellees.

REPLY BRIEF
OF APPELLANTS (APPLICANTS TO INTERVENE)



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AFFIRMATION

BURTON H. HALL, hereby affirms that he is the attorney for the Applicants to Intervene - Appellants herein, and is not a party to this action; and that on February 7, 1975, he served the Reply Brief herein upon each of the other parties herein by addressing a post-paid wrapper containing two true copies of the same to the attorneys for each such party and depositing the same in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Burton Hall

BURTON H. HALL

TABLE OF CASES

TABLE OF STATUTES AND AUTHORITIES

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REPLY BRIEF OF APPELLANTS (APPLICANTS TO INTERVENE)

Statement

Three appellees or groups of appellees -- the plaintiffs in the Rios case, the plaintiff EEOC, and the defendant Enterprise

Association -- have submitted briefs in support of the district court's order denying appellants' motion to intervene.

This reply brief, rather than deal seriatim with each argument advanced by each appellee, will seek to restate the points chiefly at issue in such fashion as to dispose of them.

POINT I.

APPLICANTS AND THE CLASS OF PERSONS THEY REPRESENT HAVE AN INTEREST IN SECURING THE RIGHTS OF MEMBERSHIP IN DEFENDANT ENTERPRISE ASSOCIATION.

The orders of the court below in the instant action, and specifically the order of November 15, 1973 (38a-39a) and the Affirmative Action Plan (40a-45a) entered as an order on March 29, 1974 (64a), create in all persons with certain skill and experience qualifications, white persons as well as nonwhite ones, a right to apply for, be tested and processed for, and to be admitted to membership in the defendant Enterprise Association. However, since those orders can only be enforced in the instant action, only those persons covered by the orders who are represented in the action can secure protection of their rights so created. It is the anomaly of this case that persons in whom valuable rights were created by the orders of the court below have been denied protection of those rights by denial of their application to intervene.

The applicants to intervene (appellants here) are persons who meet the skill and experience qualifications prescribed in the Affirmative Action Plan and who therefore desire to secure enforcement of the "Direct Admission" provisions of the Affirmative Action Plan insofar as the same relate to them. But the applicants are not members of the class represented by the Rios plaintiffs nor are they represented by EEOC, for the reason that they are neither nonwhite nor Spanish-surnamed. So although the "Direct Admission" provisions give applicants the right to apply for and be processed for admission to membership in Enterprise, that right is unprotected.* The only way that right can be protected is by intervention on the part of representatives of the class of persons that applicants seek to represent: those persons other than nonwhite and Spanish-surnamed who meet the

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* It is true that applicants have a different and separate cause of action by which they can claim membership in defendant Enterprise (see: paragraphs 11 to 14 of applicants' proposed intervening complaint, 19a-20a). Such cause of action is based jointly upon the provisions of the parent international union's constitution relating to transfer of membership from one local union to another (for applicants are members of a local union affiliated with the same parent international as Enterprise) and upon sections 3(o), 101, and 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 USC 402(o), 411 and 412. See: Hughes v. Local 11, 287 F.2d 810 (3rd Cir. 1961), cert. denied, 368 U.S. 829 (1961). At least for some of the applicants, however, success in such cause of action must be regarded as uncertain.

To relegate applicants to a separate action in which they could assert only the cause outlined above and would be barred from invoking the rights created in them by the district court's orders in the instant action would materially impair applicants' ability to protect their interest in admission to membership in Enterprise.

Plan's skill and experience requirements.

It is no answer to applicants' motion to intervene to argue that only a Title VII claimant can intervene in a Title VII suit. The subject of the present action is the procedure for admission to membership in the Enterprise Association. The applicants claim an interest in that "property or transaction." And the authorities establish that such an interest is sufficient to entitle applicants to intervene of right. Nuesse v. Camp, 385 F.2d 694 (DC Cir. 1967); Smuck v. Hobson, 408 F.2d 175 (DC Cir. 1969); Johnson v. San Francisco Unified School District, 500 F.2d 349 (9th Cir. 1974); Arnold v. Ballard, ___F.Supp.____, 6 EPD P.8694, 6 FEP Cases 899 (ND Ohio 1973).

In rejecting an attempt to limit the meaning of "interest" under Rule 24(a)(2) to "a specific legal or equitable interest in the chose," the District of Columbia Circuit, per Leventhal, C.J., laid it down in Nuesse v. Camp, supra, 385 F.2d at 700, as follows:

> "We think a more instructive approach is to let our construction be guided by the policies behind the 'interest' requirement. We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.
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> "As we said in Textile Workers Union v. Allendale Co., 96 U.S.App.D.C. 401, 403, 226 F.2d 765, 767 (1955) en banc), cert. denied sub nom. Allendale Co. v. Mitchell, in permitting intervention: "/o/bviously tailored to fit ordinary civil litigation, these provisions /of Rule 24/ require other than literal application in atypical cases....'"

In Nuesse, supra, the D.C. Circuit ruled that a state commissioner of banks had a right to intervene under the post-1966 Rule 24(a) in a suit brought by a state bank against the United States Comptroller of Currency. The plaintiff-bank's claim was that the Comptroller would violate the National Bank Act, 12 USC 36 (1964), if he approved the application of a national bank to open a new branch near plaintiff-bank's office. The state commissioner sought to intervene because he feared an interpretation of the statute contrary to plaintiff-bank's position might stand as a precedent affecting any later litigation that he might bring. The District of Columbia Circuit agreed, ruling that "under this new test stare decisis principles may in some cases supply the practical disadvantage that warrants intervention as of right" (Ibid, 385 F.2d at 702).

The D.C. Circuit followed the Nuesse case, supra, and the observationsof Judge Leventhal, quoted above, in its en banc decision in Smuck v. Hobson, supra, ruling that the parents of white school children were entitled to intervene as of right to press an appeal that the reconstituted Board of Education had decided not to press from a school desegregation order.* The white parents' "interest" in the subject of the action consisted in their desire that the Board of Education be freed from the constraints imposed

* The Smuck case, supra, affirmed the district court's decision in Hobson v. Hansen, 44 FRD 18 (D.D.C. 1968) (cited in the EEOC's brief) but implicitly rejected the narrow definition of "interest" set forth in the district court's opinion, and established a much broader definition as indicated above.

by the district court's orders upon its exercise ofdiscretion in establishing educational policy, it being the parents' hope that the Board would exercise its thus-freed discretion in a manner more to their liking. Though they could assert no legal or equitable claim that the Board should establish policy in such a manner, they nevertheless could hope that, if freed from constraints, it might do so -- and on that basis claimed an "interest" in the subject matter that justified intervention of right. The Circuit Court held en banc that the parents had borne their burden to show that their interests would "as a practical matter" be affected by a final disposition of the case without appeal, by the above showing, and established their right to intervene.

The Ninth Circuit explicitly followed the Smuck decision in ruling that parents of children of Chinese ancestry were entitled to intervene as of right in a similar desegregation case, Johnson v. San Francisco Unified School District, supra, 500 F.2d at 352-53. It further pointed out (at loc. cit.) that it had adopted the "general rationale of Smuck" in Spangler v. Pasadena City Board of Education, 427 F.2d 1352, 1353 (9th Cir. 1970) but had reached a different result there because the petitioning parents' interest was adequately represented by existing parties. The Court in Johnson, supra, in reversing the district court's denial of intervention, ruled that the Chinese parents' interest was not adequately represented either by the school district or by other intervenors in the action, a group of racially-mixed parents.

Arnold v. Ballard, supra, was a suit brought by and on behalf of black persons who would apply for or would have applied for employment in the Fire and Police Departments of defendant municipality (Akron, Ohio) but for the City officials' discriminatory hiring and employment practices. Applicants to intervene were persons on the pre-existing (all-white) eligibility list for such employment and present employees of the Fire Department; they sought to intervene in order to represent the former group's (those on the eligibility list) interest in obtaining employment and the latter group's interest in maintaining high qualifications. Over objections based on timeliness and adequate representation by existing parties, the court upheld the applicants' right to intervene. Although not citing explicit case authority, its decision is plainly upon a view of Rule 24(a) similar to that laid down in Nuesse, Smuck and Johnson, supra.

Plainly, Applicants in the instant case have an interest in gaining admission to membership in the defendant Enterprise Association. Disposition of the action may as a practical matter impair or impede their ability to protect that interest, for if the provisions of the Affirmative Action Plan entitling them to direct admission to membership are not enforced or complied with they will be compelled to base their claim to membership, in a separate action, upon the parent international union's constitution and Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 USC 411 et seq. -- which claim, as defendant Enterprise appears to concede,

is uncertain (see: Enterprise's brief, pp. 18-19).*

The remaining test of intervention of right is the adequacy of representation of applicants' interest by existing parties.** None of appellees has made a coherent showing of how applicants' interest is represented in any way at all -- adequately or inadequately -- by any existing party. Nor is such a showing rationally possible. Applicants' interest is patently adverse to Enterprise's interest in continuing to exclude applicants (though not at all adverse to the genuinely best interests of Enterprise's members in good trade unionism, which requires that all the workers in the trade or industry be organized and admitted to membership); and it is this exclusionary interest that Enterprise is plainly pursuing. (If, on the contrary, it were pursuing the interests of good trade unionism it would never have contested the instant action but would have instantly admitted to membership, upon payment of reasonable initiation fees, all applicants for membership who were either working in the trade or industry or genuinely seeking such employment.) Although applicants'

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* Even a more favorable view of Applicants' prospects in such a Title I, LMRDA suit would not affect their right to intervene in this action. As the District of Columbia Circuit observed in Nuesse v. Camp, supra, "even under the former /or pre-1966/ rule the opportunity to raise the same issue in another formum was no bar to intervention of right...." 385 F.2d at 702.

** The better reading of Rule 24(a) would suggest that the burden is on parties opposing intervention to show that the intervenor's interest is adequately represented by existing parties, than on the intervenor to show that it is not: for the rule gives a right to intervene "unless" existing representation is adequate. See: Smuck v. Hobson, 408 F.2d at 179 and footnote 27.

interest is not adverse to that of EEOC and the Rios plaintiffs, it is obviously different and separate from that interest, and requires separate representation.

POINT II.

IT WAS AN ABUSE OF DISCRETION TO DENY APPLICANTS' PETITION TO INTERVENE OF RIGHT ON GROUNDS OF UNTIMELINESS.

The ordinary civil suit ends with the entry of judgment, or (viewing it more broadly) with the recovery of judgment. When the property sued over is in the possession of the court, it may end post-judgment with the distribution of that property. But it is a rare case that continues for four years or more following judgment. That is an unusual feature of this case. Though judgment was entered June 21, 1973, the court has retained and will (at leatt to July 1, 1977) continue to retain active control of and participation in this case. While in the ordinary case there is nothing left, after judgment, for anyone to intervene in, in this case there remains a very active judicial proceeding. While that explains the unusualness of post-judgment intervention, the unusualness of the instant action fits the explanation precisely.

Quoting from McDonald v. E.J. Lavino, Co., 430 F.2d 1065, 1072 (5th Cir. 1970), the Rios plaintiffs (page 12) tell us that a post-judgment application to intervene "is ordinarily looked upon with a jaundiced eye." It would be well, and instructive, however,

to quote what the McDonald court said in the sentence immediately following:

> "The rationale which seems to underlie this general principle, however, is the assumption that allowing intervention after judgment will either (1) prejudice the rights of existing parties to the litigation or (2) substantially interfere with the orderly processes of the court."

The McDonald court, finding that neither of these results would have ensued if the intervention had been allowed, reversed the denial of intervention as an abuse of the district court's discretion.

The McDonald court noted that "the most important consideration" is whether any existing party to the litigation has been prejudiced by the proposed intervenor's delay in moving to intervene; it went on to say, "In fact, this may well be the only significant consideration when the proposed intervenor seeks intervention of right."* Ibid, 430 F.2d at 1073. (Emphasis in original.)

The prejudice involved relates to the timing of the petition to intervene: the question, therefore, is whether any existing party was or would have been prejudiced by the lapse of time between the moment the applicant should have moved to intervene and the moment

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* This Court used almost identical language in McAvoy v. Rumsey Mfg. Co., 178 F.2d 353, 356 (2nd Cir. 1959), in ruling, per Swan, C.J., that, when the "timeliness" issue is raised by a creditor's application to intervene in a bankruptcy proceeding, the bankruptcy court "is concerned only with whether the intervention, if granted, will be prejudicial to the bankrupt estate."

See also: Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir. 1970), cert. den. 400 U.S. 878 (1970) ("the more important question is ... the possibility of prejudice to existing parties that the delay may cause"); also Pyle-National Co. v. Amos, 172 F.2d 425, 428 (7th Cir. 1959).

when he did in fact move to intervene. Tennessee Coal, Iron & RR Co., v. Muscola Local 123, 5 FRD 174, 177 (ND Ala. 1946). The timeliness requirement "was not intended to punish an intervener for not acting more promptly but rather was designed to insure that the original parties should not be prejudiced by the intervener's failure to apply sooner." Note, The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure, 37 Va.L.Rev. 863, 867 (1959).

Each of the appellees argues, in its brief, that intervention was properly denied as "untimely" by the court below; none of them, however, suggests any way in which it or any other party could have been prejudiced by Applicants' "failure to apply sooner." The only appellee to assert prejudice is the Enterprise (see: Enterprise's brief, page 9) -- but its assertion shows that the "prejudice" it claims has no relation whatever to the timing of Applicants' motion to intervene. Or to put it more simply, it is not the lateness, or the lapse of time involved, that Enterprise is complaining of. What Enterprise claims as prejudice is the possibility that Applicants will succeed in obtaining enforcement of the Court's orders in regard to the class Applicants represent: "The administrative burden on the Union ... would be exaggerated," says Enterprise at page 9 of its brief, "if whites as well as nonwhites would have to be subject to the detailed reporting, correspondence and recordkeeping provisions of the District Court's Order."

The second of the two reasons for looking at post-judgment applications to intervene "with a jaundiced eye" (as the McDonald court put it in the passage quoted above) is the assumption that lateness in applying to intervene will substantially interfere with the orderly processes of the court. The cases on this point fall roughly into two categories: those in which the purposes for which the applicant sought to intervene might be labeled "forward-looking," since they dealt prospectively with issues which, at the time application was made, had not yet been decided or disposed of; and those in which the purposes for which intervention was sought were what could be labeled "backward-looking," where the applicant desired to reopen or relitigate some already decided question. It may be said generally that only applications to intervene for "backward-looking" purposes can interfere substantially with the court's orderly processes.*

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* Several of the cases cited by appellees illustrate what is meant here by applications to intervene for "backward-looking" purposes.

In Chance v. Board of Education, 496 F.2d 820, 825-26 (2nd Cir. 1974), the applicant to intervene, a teacher who had passed the tests which the court had found to be discriminatory, sought by intervention to reopen that issue and challenge the court's determination; he also sought to attack the propriety of another order allowing the permanent appointment of acting supervisors.

In United States v. Carroll County Board of Education, 427 F.2d 141 (5th Cir. 1970), applicants sought intervention in order to challenge as inadequate the school desegretation plan that had been adopted by the court.

In Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973), the applicants sought to relitigate one of several issues that had been tried together

(Footnote continued on next page)

"Backward-looking" applications for intervention necessarily involve an imposition on the court, and the court must therefore decide, in its discretion, whether the imposition is reasonable. But "forward-looking" applications involve no imposition at all, because the "forward-looking" applicant seeks only to "plug in" to the court's existing schedule: cf. Dudley v. Southeastern Factor & Finance Corp., 57 FRD 177, 181 (ND Ga. 1972). Such an application cannot substantially interfere with the court's processes.

The McDonald case illustrates what is referred to above as a "forward-looking" application for intervention. The court there noted, Ibid, 430 F.2d at 1072-73,

> "The timing of USF&G's motion to intervene could not have interfered substantially with the orderly processes of the court, for USF&G did not seek to reopen or relitigate any issue which had previously been determined. At the most, the timing of the intervention may have caused the trial court some minor inconvience. It is clear, however, that mere inconvenience is not in itself a sufficient reason to reject as untimely a motion to intervene as of right."

(Footnote continued from previous page)

and decided after a lengthy trial.

In United States v. Blue Chip Stamp Co., 272 F.Supp. 432 (CD Cal. 1967), aff'd 389 U.S. 580 (1968), the applicants to intervene had first appeared as amici curiae to oppose entry of a consent decree; had the moved to intervene at that time, in order to oppose entry of the decree, their application would have been "forward-looking." But they did not. Instead, they moved to intervene after the decree had been entered and their purpose in so doing was to reopen the issue and move to set the decree aside; their purpose was therefore "backward-looking." It was precisely this fact that served as the ground on which the district court distinguished that case from Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), for in Cascade the applicants had moved to intervene for the purpose of opposing prospective entry of a consent decree.

Compare: Diaz v. Southern Drilling Corp., supra, 427 F.2d at 1125. The Government, applicant to intervene, was concerned only with the second of two lawsuits into which the main action had been divided. No trial had been scheduled as to that second lawsuit and nothing of legal significance had occrred with regard to it except the completion of discovery and the pre-trial division to divide the main lawsuit into two. It followed that "There is no showing of any delay in the process of the overall litigation by the Government's filing of its application at the time it did." And cf.: Russo v. Kirby, 15 FR Serv. 2d 826 (ED NY 1971; per Judd, D.J.); Atkins v. State Board of Education, 418 F.2d 874, 876 (4th Cir. 1969); Johnson v. San Francisco Unified School District, supra, 500 F.2d at 354. See also the observation in Cascade, supra, 386 U.S. at 135-36, that Rule 24(a)(2) "applies to 'further proceedings' in pending actions."

In the instant case, Applicants sought, in the court below, (and still seek) only the right to "plug in" to proceedings as they stand. Applicants did not challenge or seek to challenge any judicial determination already made.* Had they been allowed to

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* This extends to the Affirmative Action Plan's goal of achieving 30% nonwhite "membership" by July 1, 1977. Applicants' objective of gaining admission to union membership on the part of the class they represent -- namely, all regularly working steamfitters presently denied membership and thus required to work under "permit" -- is neither adverse to that goal nor would it delay achievement of it. The "permit men" are already, by the terms of the Affirmative Action Plan, included in the "total membership" figure against which the 30% goal is to be measured (see: 65a-66a). EEOC is therefore in error when it suggests (page 9 of its brief) that barring them from actual membership in the "A"Local would "hasten" achievement of the 30% goal.

intervene at the time application was made their intervention could not have interfered substantially with the orderly procedures of the court below (nor would it interfere were intervention allowed at the present moment). Applicants' motion to intervene, in other words, falls squarely within the category of "forward-looking" applications to intervene.

It follows that denial of Applicants' motion to intervene of right on grounds of untimeliness was an abuse of discretion.*

CONCLUSION

For all the foregoing reasons, and those set forth in Applicants' main brief, the order of the district court denying intervention of right should be reversed and the cause remanded.

Respectfully Submitted

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Attorney for Applicants

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* The concluding comments of the court in McDonald v. E.J. Lavino Co., supra, 430 F.2d at 1074, are relevant here:

"It goes without saying, of course, that a reversal for 'abuse of discretion' does not imply that the district judge has been guilty of some egregious blunder. (citing authority) This is especially true in this case.... Thus we would not want it thought that our decision implies any criticism of the district judge's handling of this case. Our reversal simply means that this court, after studying the entire record in the light of all the relevant considerations, concludes that the reasons militating in favor of granting the motion to intervene substantially outweighed the reasons militating against it."